

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

CHARLES C. JOHNSTON

v.

COMMISSIONER OF
REVENUE

Docket No. F231855

Promulgated:
March 23, 2000

This is an appeal under the formal procedure pursuant to G.L. c. 62C, § 39, from the refusal of the appellee to abate personal income tax assessed against the appellant under Chapter 62, § 2, for the tax years 1984 through 1989.

Commissioner Scharaffa heard the appeal and was joined in the decision for the appellee by Chairman Gurge and Commissioners Burns and Egan. Commissioner Gorton took no part in the hearing or decision in this appeal.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13, and 831 CMR 1.32.

Edward F. Hines, Esq. and Kevin J. Lesinski, Esq. for the appellant.

Thomas J. Nicholas, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Based on testimony and exhibits offered into evidence at hearing, the Appellate Tax Board ("Board") made the following findings of fact.

On October 22, 1990, the Commissioner of Revenue ("Commissioner") issued to Charles C. Johnston a Notice of Failure to File Tax returns for tax years 1984 through 1989.¹ On December 2, 1992, Mr. Johnston, through his representative, filed a special consent extending the time for assessment of taxes authorizing the Commissioner to act at any time up to 60 days after the letter of final determination issued by the Appeal & Review Bureau ("A&R"). On July 25, 1993, eight days after A&R's final determination, the Commissioner issued a Notice of Assessment in the amount of \$3,831,346.00, plus statutory additions. Johnston filed an Application for Abatement on December 27, 1994 which was denied by the Commissioner on August 22, 1995. On September 9, 1995, Johnston timely filed his appeal with the Board. On this basis, the Board found that it had jurisdiction over this appeal.

In early 1990, the Department of Revenue ("Department") investigated whether Mr. Johnston filed tax

¹ As of this date the Commissioner had not received Mr. Johnston's 1989 tax return. Pursuant to an executed Application for Extension of Time to File, the return was due on October 15, 1990.

returns for the years in issue. The matter was referred to the Audit Bureau where Ms. Karen O'Connor-Powers, Domicile Manager of the Desk Audit Bureau, conducted an alphabetical search, based on Mr. Johnston's last name, of all returns looking for Mr. Johnston's tax returns for 1984 through 1988. According to Ms. Powers's testimony she was unable to locate any returns for the years in issue. The matter was also relayed to the Criminal Investigations Bureau where Mr. John Trudnak also searched through the Department's records using both an alphabetical and a numerical search, based on Mr. Johnston's Social Security number. Mr. Trudnak testified that he too was unable to locate any returns, either resident or non-resident, filed by Mr. Johnston for the years in issue.

On April 18, 1990, the Department issued an administrative summons to Mr. Johnston requesting his income tax returns for the years 1984 through 1988. Mr. Johnston first testified that upon receiving the summons he immediately got the returns from the file and handed them over to the Department. He later stated that in a day or so of the request, his accountant gave copies to the Department. Contrary to either statement made by Mr. Johnston, copies of his 1984 through 1988 tax returns

were not filed with the Department until May 14, 1990, more than a month after the request.

Mr. Johnston maintained that the state returns had been prepared by his accountant, Mr. Barry, and were timely filed. According to the copies, however, all of the returns were filed after their respective April 15th due dates. Mr. Johnston did not provide copies of Requests for Extension Of Time To File for these years nor did Mr. Barry testify as to the timely filing of the returns.

After the returns were provided to the Department, Mr. Johnston noted that his Social Security number on the returns was incorrect due to a transposition error within the last four digits. He suggested that perhaps this was the reason for the Department's inability to locate the returns. Both Ms. Powers and Mr. Trudnak, however, stated that they had searched the records not only by Social Security number but also by name. Therefore, the transposition error would not have prevented them from locating the returns.

Many of the 1984 through 1988 returns were incomplete. Throughout the years, Mr. Johnston generated income from various partnerships and trusts. Several of the returns, however, were missing necessary schedules and required forms. None of the returns included the federal Schedule E

and the 1984 return was missing the Massachusetts Schedule E. They were also missing Schedules A and K-1, or the appropriate substitute.

Many of the schedules which were filed listed Mr. Johnston's address as "161 Forbes Road, Braintree, Massachusetts," not New Hampshire. In addition, where the required schedules were filed, many listed Mr. Johnston as a "resident." Lastly, all of the schedules which were provided had the correct Social Security number for Mr. Johnston.

Each of the returns presented showed a refund due Mr. Johnston which he designated to be applied to the following year's liability. The 1987 refund, however, was not applied on the 1988 return.

Mr. Johnston testified that the 1984 through 1988 state returns, like the federal returns, were prepared by Mr. John Barry, a Certified Public Accountant and tax specialist for Mr. Johnston's company, ISI Systems. The two sets of returns, however, were visually different in several ways. Only the state returns were signed by Mr. Barry, who Mr. Johnston claimed was the preparer. The state returns listed both a post office box and a street address whereas the federal listed only a post office box. Lastly, the typesetting on the federal returns was

different from that on the state returns. According to Mr. Johnston, he would review the prepared returns, sign them and then Mr. Barry would file the returns. At no time did Mr. Barry testify as to the timely filing of the returns.

In the beginning of November 1990, Mr. Johnston's 1989 tax return was filed. This return, unlike the 1984 through 1988 returns, however, was not prepared by Mr. Barry. Also unlike the 1984 through 1988 returns, the 1989 return included the Request for Extension of Time to File as well as all necessary schedules.

On the basis of the foregoing, the Board found that Mr. Johnston did not file his state tax returns for the years 1984 through 1988 until May 14, 1990, in response to the administrative summons issued a month earlier, and that he did not file his 1989 tax return until November 6, 1990. Further, the Board found that Mr. Johnston executed a consent to extend the Commissioner's time for assessment prior to the expiration of the three-year statutory deadline. Accordingly, the Board found that the Commissioner's assessments for tax years 1984 through 1989 were valid.

Regarding the issue of domicile, Mr. Johnston was born and raised in Connecticut. He attended Worcester

Polytechnic Institute in Worcester, Massachusetts, where he met his future wife. After serving in the United States Army, Mr. Johnston married his wife, Loretta, in 1957. The couple had five children and eventually made their home in Hingham, Massachusetts.

In 1969, Mr. Johnston founded ISI Systems, a computer company specializing in facility management applications for insurance companies. The company's principal place of business was 161 Forbes Road, Braintree, Massachusetts. In 1975, he sold his ownership interest in ISI to Grumman Corporation. Mr. Johnston remained as CEO of ISI and became a Director of Grumman.

At about the same time, Mr. Johnston formed Mast Hill Associates to spin off certain ISI investments which were not purchased by Grumman. Mr. Johnston claimed to have moved Mast Hill to New Hampshire at the time of his separation from his wife in 1979. Mr. Johnston later testified, however, that Mast Hill's principal place of business was also 161 Forbes Road, Braintree. In 1986, Mr. Johnston repurchased ISI from Grumman. He then took the company public and finally, in 1989, the same year as his divorce, he sold ISI to Memotech, a Canadian corporation. Again, Mr. Johnston remained CEO of ISI and

became a Director of Memotech, under a three-year employment contract.

Mr. Johnston and his wife separated in 1979 although they did not divorce until 1989. Mr. Johnston maintained that, after the separation, he moved to their ski chalet in Franconia, New Hampshire, some three plus hours away. Mr. Johnston retained an individual to pick up his mail in New Hampshire and to forward it to him in Braintree. The utility bill, however, was mailed directly to him at 161 Forbes Road, Braintree. Prior to his separation, Mr. Johnston and his family typically went to New Hampshire on weekends to ski. His son, Charles P. Johnston, testified that there was a problem with the roof leaking and seepage in the basement.

Mr. Johnston testified that after his separation, when he was in Massachusetts for consecutive days to conduct business, he stayed with his friend, Charles Adams, in his apartment at Tremont on the Common in Boston, rather than commute more than three hours to New Hampshire. According to Mr. Johnston, he stayed there frequently enough that he eventually took over the lease. Mr. Adams did not testify as to the frequency with which Mr. Johnston stayed at the Boston apartment.

In late 1981 or early 1982, Mr. Johnston met and began dating Sandra King, a real estate agent for Hunneman Corporation in Massachusetts. Throughout the years in issue, their relationship continued. Ms. King continued to reside in the Commonwealth, at one point living in the same condominium building as Mr. Johnston.

In 1983 when the Tremont on the Common apartments were converted into condominiums, Mr. Johnston purchased the unit through the Tremont on the Common Trust ("TOC Trust"), of which he was the primary beneficiary. Mr. Johnston also purchased a parking space. He owned this unit for two years. After the Tremont on the Common condominium was sold, TOC Trust purchased a new condominium in Harbor Towers, East India Row, Boston. This unit was also owned in trust with Mr. Johnston as the primary beneficiary. Subsequently, in 1990, Mr. Johnston sold this unit to Ms. King.

In 1986, Mr. Johnston entered into a Purchase and Sale Agreement ("P&S") for yet another condominium in Boston. This unit was located at Rowes Wharf and cost \$820,500. The P&S listed Mr. Johnston's address as "80 East India Row." At the time that he entered into the P&S, the Rowes Wharf unit was still under construction. Mr. Johnston was very involved in the finishing details of the unit,

including having a three-hundred-gallon fish tank installed in the unit at a cost of \$6,511.82. Mr. Johnston also purchased a parking space at Rowes Wharf and tried to obtain a boat slip.

Mr. Johnston eventually moved into the unit in 1988. In a letter written to the Beacon Companies, the Rowes Wharf construction company, dated May 5, 1988, Mr. Johnston referred to himself as "a resident owner in unit 609." In another letter dated September 19, 1988, Mr. Johnston stated that he had "lived in the unit for a month." He continued to complain about the hot water and water pressure problems for more than five months.

Mr. Johnston continuously complained about leaks, unclean windows, lack of water pressure and steam, noise, lack of a boat slip, inadequate repairs, and damage to personal belongings, including furniture, during repairs to his condominium. Eventually, Mr. Johnston pursued legal action against the Beacon Companies because he was not satisfied with his condominium. All of the correspondence was by letter which listed Mr. Johnston's address not as Franconia, New Hampshire, but as 161 Forbes Road, Braintree. There was no mention of ISI Systems in the correspondence.

During the years in issue, Mr. Johnston also maintained a two-bedroom unit in Harvard Towers, Cambridge. Mr. Johnston originally purchased the Harvard Towers building because it was close to ISI's processing center in Arlington and during ISI's earlier years it was necessary for Mr. Johnston to be close by. In 1985, Mr. Johnston sold the building. It was agreed, however, that Mr. Johnston would maintain one of the units for five years from the date of sale.

In support of his position that he had become a New Hampshire resident, Mr. Johnston testified to the following: he registered to vote in New Hampshire; he registered his 1983 Jaguar in New Hampshire; he acquired a New Hampshire driver's license; he formed a partnership with other New Hampshire residents; he joined a local church, Our Lady of the Snows in Franconia; he joined the local Elks club; he paid the Franconia residency tax and the New Hampshire Interest and Dividends tax; and, he notified the Massachusetts Department of Revenue that he was no longer a Massachusetts resident.

Although Mr. Johnston registered to vote in New Hampshire, documents offered into evidence indicated that he voted only in the 1980 Presidential election and, after the DOR audit was begun, in a November 1990 local election.

The 1983 Jaguar which was registered in New Hampshire was owned by Mast Hill Association, a corporation owned by Mr. Johnston. Although the registration listed the address for the company as Nashua, New Hampshire, Mr. Johnston's testimony, supported by various insurance documents, established that the principal address for Mast Hill was 161 Forbes Road, Braintree. Furthermore, Mr. Johnston obtained a parking space at Rowes Wharf, Boston, and listed that address as the primary location of garaging on the insurance documents for his 1983 Jaguar.

Mr. Johnston claimed that he obtained a New Hampshire driver's license but did not provide any independent proof to support his testimony. Furthermore, Mr. Johnston testified that sometime in the late eighties he obtained a Massachusetts driver's license. The Massachusetts license produced at trial expired on March 20, 1992.

Mr. Johnston offered no testimony as to how often he attended Mass at the Franconia, New Hampshire church. Instead, he offered a copy of one cancelled check for a contribution made in 1986. This check was drawn on a Massachusetts bank account. At no time did Mr. Johnston maintain a New Hampshire bank account. Mr. Johnston also suggested that he spent each Christmas with his family in New Hampshire. This, however, was contradicted by several

of his children who testified that Christmas was spent in Hingham. In addition, the children noted that Thanksgiving was generally spent in Connecticut.

Mr. Johnston also offered copies of his work diary for the years 1986 through 1989. The pages noted meetings and events which Mr. Johnston attended. They also included notations as to where Mr. Johnston spent the night, i.e. MA, NH, NY or COL. Mr. Johnston admitted, however, that these notations were not made at the same time the diary entries were made but were made after the first meeting with the Department.

Review of the diary entries revealed several inconsistencies. For one, on May 6th, 1986, Mr. Johnston had an entry that he had a meeting in California but noted that he had stayed in Massachusetts. When questioned, Mr. Johnston stated that the meeting had been cancelled but no such notation appeared in the diary. Second, for December 4, 1988, there is an entry of SEATTLE but with a New Hampshire notation. Mr. Johnston suggested that the SEATTLE notation might indicate whom the Patriots were playing that day. Then, in a letter dated Monday, December 5, 1988, written to the Beacon Management Company, Mr. Johnston complained about the draft coming through the window. He stated that this situation is a problem on a

windy, cold day and was "most noticeable this past Sunday," a day he was supposedly in New Hampshire according to his diary entries. Even if the diary entries were found to be accurate and reliable, the overnight notations indicate that, with the exception of 1986, Mr. Johnston spent more nights in Massachusetts than in any other one place.

Analysis of Mr. Johnston's telephone records reveal that the majority of his phone calls were placed from Massachusetts. In 1989, there were 117 days with itemized calls placed from Rowes Wharf and 98 days with itemized calls placed from Harvard Towers. Mr. Johnston had exclusive control over these two units. There were, however, only 23 days when itemized calls were made from his New Hampshire property which, as Mr. Johnston conceded, his family continued to visit. Accordingly, his family members could have placed some or all of the calls made from the New Hampshire property.

A review of monthly statements for two of Mr. Johnston's credit cards for the years 1985 through 1989 show that Mr. Johnston made a total of 691 charges during the years in issue. Of these charges, 674, or 97.5 percent, were made in Massachusetts for a total amount of \$103,088.69. The remaining 17 or 2.5 percent were made in New Hampshire for a total amount of \$1,336.27. Further

analysis of the accounts indicates that the charges were made on 489 different dates. According to the statements, Mr. Johnston used his credit cards in Massachusetts on 475 days, while he made charges in New Hampshire on only 13 days during the years 1985 through 1989.

Based on all the evidence, the Board also found that, although Mr. Johnston had some connections to New Hampshire, he retained strong ties to, and maintained a continuing and regular physical presence in, Massachusetts during the years in question. His weekend travels to New Hampshire were no different than his routine prior to his separation from his wife. The business which he created and of which he was CEO was located in Massachusetts, more than a three-hour drive from his claimed residence in New Hampshire. Mail which was sent to the New Hampshire ski chalet was forwarded to Massachusetts. His only bank accounts were located in Massachusetts. He invested in several luxury condominiums in Massachusetts, which he regularly used. Mr. Johnston continuously listed Massachusetts addresses on various documents, including portions of his tax returns, the Rowes Wharf purchase and sale agreement, leasing information and insurance documents. He also listed himself as a "resident" on portions of his tax returns.

The Board also found that some of Mr. Johnston's allegations of connections with New Hampshire did not withstand scrutiny on cross-examination. For example, the diary entries indicating where he stayed on a particular night were entered after the audit process had begun. The Board also found that Mr. Johnston's children offered little in the form of credible evidence to support his alleged change of domicile from Massachusetts to New Hampshire. Mr. Johnston failed to offer any other witnesses to support his change of domicile.

On this basis, the Board found that the center of Mr. Johnston's domestic, social, and personal life was in Massachusetts and that Mr. Johnston was a Massachusetts domiciliary. The Board also found that Mr. Johnston's physical presence in New Hampshire, primarily on weekends, was insufficient to establish that he intended to make New Hampshire his home during the years in issue. Accordingly, the Board determined that Mr. Johnston was a Massachusetts domiciliary for the years in issue.

OPINION

The Commissioner is authorized to assess additional taxes at any time within three years from the date a taxpayer's return was filed or was required to be filed,

whichever occurs later. G.L. c. 62C, § 26 (2). Prior to the expiration of the three-year period, the Commissioner and taxpayer may consent to extend the time for assessment. G.L. c. 62C, § 27.

The Board found that Mr. Johnston did not file his 1984 through 1988 tax returns until May 14, 1990, and that he did not file his 1989 tax return until November 5, 1990. Therefore, the Commissioner had until May 14, 1993 and November 5, 1993, respectively, to make the additional assessments. On December 3, 1992, prior to the expiration of the three-year period, the taxpayer filed a Special Consent Extending the Time for Assessment of Taxes for all tax years in issue.

This form authorized the Commissioner to make additional assessments for tax years 1984 through 1989 at any time within sixty days after the letter of final determination was issued by the Appeal & Review Bureau ("A&R"). (Ex. BB). On July 20, 1993, A&R issued a letter of determination, and on July 28, 1993, the Commissioner assessed the additional taxes. Therefore, the Board ruled that the Commissioner's assessments of additional taxes for tax years 1984 through 1989 were timely.

The Commissioner's additional assessments arose from his determination that Mr. Johnston was in fact a

Massachusetts domiciliary. Massachusetts residents are taxed, with certain limitations not relevant here, on all of their income from whatever source derived. G.L. c. 62, § 2. Nonresidents, however, are taxed only on income from Massachusetts sources. G.L. c. 62, § 5A. Accordingly, if Mr. Johnston was a Massachusetts resident during the years in issue, all of his income, including proceeds from the sale of his ISI stock, would be subject to tax.

It is well-settled in Massachusetts that "[a] person's domicile is usually the place where he has his home' Home, in turn, is 'the place where a person dwells and which is the center of his domestic, social and civil life.'" **Reiersen v. Commissioner of Revenue**, 26 Mass. App. Ct. 124, 125 (1988)(citations omitted).

A person's domicile is primarily a question of fact. **Natl. Bank & Trust Co. v. Commissioner of Corps. & Taxn.**, 327 Mass. 631, 632 (1951); **Commonwealth v. Davis**, 284 Mass. 41, 50 (1933). The elements to be considered, however, in determining a person's domicile present a question of law. **Reierson** at 124-25; see also **Tapper & Foley v. Commissioner of Revenue**, 18 Mass. App. Tax Bd. Rep. 75, 81 (1995), *aff'd* 42 Mass. App. Ct. 1123 (1997). The most "persuasive indicators of domicile" are the "physical, business, social

and civic activities of the taxpayer." **Reiersen** 26 Mass. App. Ct. at 131.

Although a person may have residences in more than one state, a person can have only one domicile for tax purposes. *Id.* at 128-29; see also **Shea v. Commissioner**, 20 Mass. App. Tax Bd. Rep. 206 (1997), *aff'd* 44 Mass. App. Ct. 1116 (1988). One's domicile is "the place of actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode." **McMahon v. McMahon**, 31 Mass. App. Ct. 504, 505 (1991).

Once established, a domicile "is presumed to continue until a new one is acquired by actual change of residence with the intention of remaining permanently at the place of removal.'" **Commonwealth v. Bogigian**, 265 Mass. 531, 538 (1929) *citing Sullivan v. Ashfield*, 227 Mass. 24, 26 (1917); see also **Mellon National Bank & Trust v. Commissioner of Corporations & Taxation**, 327 Mass. 631, 640 (1951).

A change of domicile occurs "when a person with capacity to change his domicile is physically present in the place and intends to make that place his home for the time at least; the fact and intent must concur." **Hershkoff v. Registrars of Voters of Worcester**, 366 Mass. 570, 577

(1974). "Mere absences from home even for somewhat prolonged periods do not work a change of domicile." **McMahon**, 31 Mass. App. Ct. at 506.

The burden of proof is on the taxpayer to establish that he has changed his domicile, although that burden is no more rigorous than in other statutory abatement proceedings under G.L. c. 62C, § 39. See **Shea v. Commissioner of Revenue**, No. 97-P-432, Mem. and Order Pursuant to Rule 1.28 at 1 (March 3, 1998), *aff'g* 20 Mass. App. Tax Bd. Rep. 206 (1997); **Horvitz v. Commissioner of Revenue**, 1999 Mass. A.T.B. Adv. Sh. 57, 80-82 (Docket No. F231494, March 2, 1999). In determining whether a taxpayer has met the burden of proof, "[t]he credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board." See, e.g., **Cumington School of the Arts, Inc. v. Assessors of Cumington**, 373 Mass. 597, 605 (1977). Proof of domicile "depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case." **Roarke v. Hanchett**, 240 Mass. 557, 561 (1922).

In the present appeal, the subsidiary facts and reasonable inferences drawn from them supplied a persuasive basis for finding that the taxpayer did not change his

domicile from Massachusetts to New Hampshire in 1979 or at any other time relevant to this appeal. The taxpayer's use of his New Hampshire ski chalet after 1979 was not shown to be appreciably different from his and his children's use prior to 1979. He invested in and used several condominiums located in Massachusetts after his supposed change of domicile to New Hampshire. Compare **Horvitz**, 1999 Mass. A.T.B. Adv. Sh. at 82-3 (taxpayer's purchase of temporary and permanent residences in Massachusetts, both larger than his Florida condominium, evidence of intent to change domicile to Massachusetts) and **Rosenthal v. Commissioner of Revenue**, 22 Mass. App. Tax Bd. Rep. 234 (1997) (substantial investment in Florida condominium and furnishings evidence of intent to change domicile to Florida).

The Massachusetts condominiums which the taxpayer purchased and used were substantially closer to the Massachusetts company which he founded and continued to run. His purchase and use of Massachusetts condominiums, located a short commuting distance from his business, support a finding that he intended to remain domiciled in Massachusetts, and make it much less credible that he intended to change his domicile by moving to his New Hampshire ski chalet, located more than three hours

from his place of work. Compare **Scagel v. Commissioner of Revenue**, 13 Mass. App. Tax Bd. Rep. 38 (1990)(Board found that taxpayer changed domicile to New Hampshire where, among other factors, New Hampshire residence only a forty-five minute commute from Massachusetts place of employment). In addition, the taxpayer himself listed his Massachusetts addresses as his residences on various forms during the years at issue. Moreover, his girlfriend resided in the Commonwealth, at one point in the same condominium building as the taxpayer.

The taxpayer's credit card records show that the vast majority of his credit card purchases were in Massachusetts as opposed to New Hampshire. Telephone records also establish that the majority of the taxpayer's phone calls were placed from Massachusetts. His accountant and bank accounts were located in the Commonwealth, and he maintained a Massachusetts driver's license during part of the period at issue.

In contrast, the taxpayer's evidence in support of a change in domicile to New Hampshire appeared to be more form than substance. See **Horvitz** at 83-84. These factors included acquiring a New Hampshire driver's license during part of the period at issue; registering to vote but only voting in two elections in New Hampshire; paying certain

local and New Hampshire taxes; joining a local church and Elks Club with little indication of the extent of his involvement in either, other than one cancelled check drawn on a Massachusetts bank for a contribution to the church; and notifying the Massachusetts Department of Revenue that he was no longer a Massachusetts resident. These factors are insufficient to support a conclusion that the taxpayer changed his domicile from Massachusetts to New Hampshire.

The Board ruled that Massachusetts was Mr. Johnston's domicile because he had a present and future intent during the years in issue to retain Massachusetts as his home and the center of his personal, business, social and civic life. Accordingly, the Board issued a decision for the appellee in this appeal.

APPELLATE TAX BOARD

By: _____
Abigail A. Burns, Chairman

A true copy,

Attest: _____
Clerk of the Board